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No. 86-614

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
October Term, 1986

CHARLES C. WELCH,

Petitioner,

—against—

CARSON PRODUCTIONS GROUP, LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

STEPHEN F. HUFF

Counsel of Record

PRYOR, CASHMAN, SHERMAN & FLYNN

JAMIE M. BRICKELL

On the Brief

Counsel for Respondent

410 Park Avenue

New York, New York 10022

(212) 421-4100

1299



TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutory Provisions Involved	2
Counterstatement of the Case	2
ARGUMENT:	
I. No Constitutional Issues Are Raised By The Decisions Of The District Court	5
II. The District Court Properly Excluded Evidence Concerning Illegality	7
CONCLUSION	9

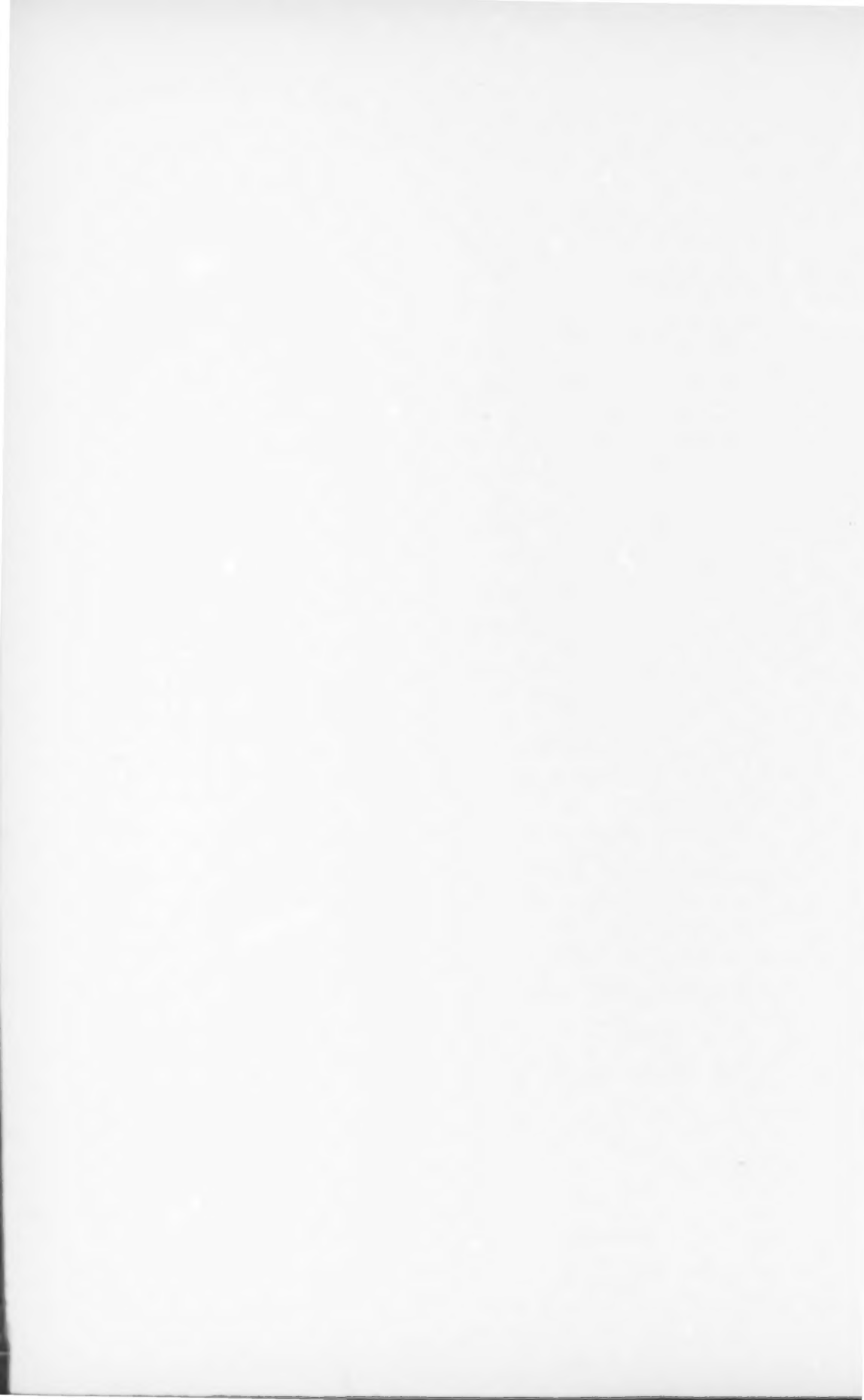
TABLE OF AUTHORITIES

Cases:

<i>Orshan v. Anker</i> , 550 F. Supp. 538 (E.D.N.Y. 1982) ..	8
<i>Zdanok v. Glidden Company</i> , 327 F.2d 944 (2d Cir.), <i>cert. denied</i> , 377 U.S. 934, 84 S.Ct. 1338 (1964) ...	8

Statutes and Rules:

New York Civil Rights Law, §51	<i>passim</i>
Public Health Cigarette Smoking Act of 1969	<i>passim</i>
Fed. Rules of Evidence, Rule 403	8



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Opinions Below

The opinion of the Second Circuit Court of Appeals dated May 16, 1986 was reported at 791 F.2d 13 (2d Cir. 1986) and is set forth in the Appendix of the Petition at pages A-1 through A-9. The decision of the United States District Court for the Southern District of New York dated August 30, 1985 is not officially reported and appears in the Appendix of the Petition at pages A-10 through A-14.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Whether there are any Constitutional issues raised by the rulings of the District Court in this action.
2. Whether there is any basis for overturning the District Court's decision to exclude evidence concerning "illegality."

Statutory Provisions Involved

The pertinent provisions of the New York Civil Rights Law are set forth in the Appendix of the Petition at page A-32. The pertinent provisions of the Public Health Cigarette Smoking Act are set forth in the Appendix of the Petition at page A-33.

Counterstatement of the Case

Respondent Carson Productions Group, Ltd.¹ (hereinafter "Carson"), a television production company, sought to produce a program in 1982 entitled "Television's Greatest Commercials-Part II", a retrospective look at thirty years of television commercials. In order to obtain the right to utilize such commercials, Carson contacted the companies owning the rights thereto and entered into various agreements for such reuse. Thus, Carson obtained the rights to use all of the commercials ultimately shown on the program.

In addition, Carson contacted the Screen Actors Guild (hereinafter "SAG") in order to determine the manner in which it was required to compensate those actors who had appeared in the selected commercials. SAG advised Carson that it would have to comply with the terms of the 1977 SAG Television Agreement (hereinafter "the Green Book"), which provided

¹Respondent Carson Productions Group, Ltd. has no parent company, subsidiaries or affiliates within the meaning of Supreme Court Rule 28.1.

that a producer may not reuse television film of an actor in a manner other than that for which the actor originally was employed "without separately bargaining with the player and reaching an agreement regarding such use . . ." Green Book §36(a). More importantly, in addition to providing rates for paying actors for such reuse, the Green Book further provided that "[i]f the Producer is unable to find the player, it shall notify the Guild [SAG], and if the Guild is unable to find the player within a reasonable time, the Producer may use the photography . . . without penalty . . ." (§36(b)).

Consistent with such requirements, Carson attempted to identify the actors and actresses who had performed in the commercials it intended to use. The search proved unsuccessful in a number of cases, including the identification of Petitioner Charles C. Welch (hereinafter "Welch"), who had appeared for a total of five seconds in two commercials which Carson planned to use, one of which was a commercial for a cigarette called "Benson & Hedges." After Carson and SAG were both unable to identify Mr. Welch, Carson included the two commercials in which Mr. Welch appeared in the broadcast of the show in accordance with Section 36(b) of the Green Book.

After Mr. Welch contacted Respondent Carson and the two parties were unable to agree upon a figure to compensate him for reuse of his photographs, Petitioner Welch commenced an action against Carson seeking an injunction and damages in connection with a claimed violation of New York Civil Rights Law §51 based upon Carson's failure to obtain Mr. Welch's written permission to use his picture in such program.² As a

²Petitioner Welch also named Jane L. Ltd., another production company, and Andreas Industries, Inc., the parent company of Jane L. Ltd., as defendants in this action based upon use of another commercial utilizing Mr. Welch's picture in a similar show. In a March 3, 1984 decision rendered by Judge Werker of the United States District Court for the Southern District, which decision is discussed below, the claims against these two defendants were dismissed as time-barred.

defense to such claims, Respondent Carson asserted, *inter alia*, that Mr. Welch's execution of an agreement with SAG whereby he agreed to abide by the by-laws of such Guild constituted the written permission required under the New York Civil Rights Law.

Both parties moved for summary judgment, *inter alia*, on the issue of written consent and, in an Order dated March 3, 1984, Judge Werker of the United States District Court for the Southern District of New York denied both motions. However, more significantly for these purposes, Judge Werker found as a matter of law in connection with the New York Civil Rights Law that "the use of plaintiff's [Petitioner's] picture was not for the purpose of advertising." Petitioner did not appeal this decision and was therefore bound by it.

Over the express written objection of Respondent Carson, Petitioner Welch made reference in the February 5, 1985 Joint Pre-trial Order submitted in this action, a copy of the relevant portion of which can be found in the Appendix of the Petition at pages A-21 and A-22, to the Public Health Cigarette Smoking Act of 1969 (hereinafter "the Act"), which provides, in pertinent part, that "it shall be unlawful to advertise cigarettes . . . on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." Moreover, also over the express written objection of Respondent Carson, Petitioner Welch alleged in the aforesaid Joint Pre-trial Order that the November 2, 1982 agreement between Respondent Carson and Phillip Morris, whereby Respondent obtained the right to utilize, *inter alia*, the "Benson & Hedges" commercial depicting Mr. Welch, a copy of which is located in the Appendix of the Petition at pages A-23 through A-25, was violative of the Act. Petitioner Welch, while alluding to the Act in his amended complaint, confined his causes of action against Respondent Carson to the aforesaid claimed violations of the New York Civil Rights Law.

At trial, Petitioner Welch sought to introduce evidence as to the Act and its supposed impact on the Carson/Phillip Morris agreement. The District Court (J. Kram) ordered that no such evidence would be permitted. After a trial on the merits, the District Court directed a verdict in favor of Respondent Carson, finding as a matter of law that Petitioner failed to establish a prima facie case inasmuch as permission to use the pictures in question was provided by SAG on Welch's behalf. The Second Circuit Court of Appeals unanimously affirmed the District Court decision and subsequently denied Welch's Petition for Rehearing and Suggestion for Rehearing En Banc.

Petitioner Welch submits the Petition for Writ of Certiorari in this matter, essentially claiming to have been improperly denied the opportunity to introduce evidence relating to the Act at trial. However, for a number of reasons set forth below, the decision to exclude such evidence was entirely proper and this Court should deny Welch's Petition.

ARGUMENT

I.

No Constitutional Issues Are Raised By The Decisions Of The District Court.

The Petition for Writ of Certiorari in this action sets forth five "questions presented" relating to the Act, several of which purportedly raise "Constitutional" issues in relation thereto. Specifically, Petitioner contends that his Constitutional right of Due Process "under the 7th Amendment" was violated by exclusion of evidence relating to the Act and by the direction of a verdict by the District Court in Respondent's favor. Petitioner also makes substantive reference within such Petition (at page 7 thereof) to the Seventh Amendment, accurately setting forth that such Constitutional Amendment pertains to one's right to

trial by jury. However, whether Petitioner is invoking the Fifth or the Seventh Amendment to the United States Constitution—and a careful reading of his Petition does not indicate which Amendment he is invoking—it is clear that no Constitutional questions are raised therein.

Specifically, the Seventh Amendment to the United States Constitution, which is set forth at page 7 of the Petition, relates to a person's right to trial by jury. The exclusion of particular evidence from a trial in no way prejudices a party's right to trial by jury, and Petitioner's reference to the "7th Amendment" in connection therewith is an absolute *non sequitur*. Moreover, a District Court is entirely within its right to take a case from the jury and direct a verdict pursuant to Fed. R. Civ. P. 50(a)—as the District Court did in the present case—when it finds as a matter of law that Petitioner has not made out its *prima facie* case. Petitioner has put forth no legal authority—and there certainly is no such authority—for his proposition that a District Court deprives a party of his Seventh Amendment rights merely by directing a verdict. As such, Petitioner's reference to the violation of right to trial by jury is unfounded.

Petitioner also makes reference, without specific citation, to a violation of his "due process" rights. Even assuming, *arguendo*, that Petitioner is referring thereby to the Fifth Amendment to the United States Constitution and his right to a "fair trial"—something which Petitioner never articulates or explains in his Petition—it is clear that no such violation of his rights took place. Mr. Welch commenced an action for violation of his rights pursuant to the New York Civil Rights Law and presented his case in connection therewith. After a complete trial, the District Court determined that Petitioner failed to make out a *prima facie* case under the Civil Rights Law, and properly directed a verdict. Again, Petitioner has offered no legal authority—and there is in fact no such authority—for his contention that his due process rights were violated because the

District Court excluded evidence on an unrelated matter which he improperly asserted to be relevant.³ As such, none of Petitioner's Constitutional rights were violated in any way by the rulings of the District Court.

II.

The District Court Properly Excluded Evidence Concerning "Illegality".

Petitioner sought to introduce evidence at trial relating to the Act in order to somehow demonstrate that the agreement between Respondent Carson and Phillip Morris was in violation of the Act and, therefore, was null and void. In furtherance of such effort, Welch's Petition sets forth authority intending to further the convoluted proposition that since cigarette advertising on television is illegal, the broadcast of the "Benson & Hedges" commercial was therefore illegal and accordingly the license from Phillip Morris to Respondent was ineffective. The basic flaw in Petitioner's argument, however, is the total lack of illegality at any level—either in the license from Phillip Morris to Respondent or the inclusion of the commercial in the television program produced by Carson.

Even assuming, *arguendo*, that there is any substance to Petitioner's claim concerning illegality, however, the District Court nonetheless acted within its rightful power in excluding such evidence for several distinct reasons. First, as set forth above, Judge Werker's March 3, 1984 decision found that such commercial, as used in the context of the Respondent's show, was not utilized for purposes of advertising. Petitioner sought to in-

³As will be discussed below, Petitioner brought no claims against Carson under the Public Health Cigarette Smoking Act, despite reference thereto in his amended complaint. In fact, there is no private cause of action thereunder. Stated simply, Welch has no standing to litigate the "case" which he seeks to argue before this Court.

troduce evidence at trial relating to the Act, which prohibited cigarette advertising. Under the doctrine of law of the case, the courts will refuse to reopen that which has already been decided. *Orshan v. Anker*, 550 F. Supp. 538 (E.D.N.Y. 1982); *Zdanok v. Glidden Company*, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934, 84 S. Ct. 1338 (1964). Therefore, the District Court correctly refused to permit such evidence.

In addition, Petitioner's attempts to introduce evidence as to the illegality of broadcasting cigarette commercials were intended to give the jury the misleading and false impression that defendant had engaged in criminal activity in order to influence the jury's determination of damages. In excluding the testimony or any reference to illegality the court acted properly and within the scope of Rule 403, which explicitly provides that:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

As such, the Court's exclusion of such evidence was within its power pursuant to the Federal Rules.

Equally compelling, contrary to all of Petitioner's assertions concerning the Act, a private individual has no standing to assert a claim pursuant to the Public Health Cigarette Smoking Act of 1969. Thus, despite his invocation of questions concerning "national public health interests", while the appropriate law enforcement authorities may enforce the laws concerning advertising on television, Mr. Welch may not.

Finally, even if an individual had standing to assert a claim pursuant to the Act, the simple fact is that Mr. Welch asserted no such claim. The amended complaint in this action, portions of which are found in the Appendix of the Petition at pages

A-15 through A-18, while it *mentions* the Act, asserts no causes of action against Respondent thereunder. Under these circumstances, it is clear that the District Court acted in an entirely proper manner by excluding such evidence and there is therefore no "taint" on its decision to direct a verdict in Respondent's favor, as Petitioner would have this Court believe.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN F. HUFF

Counsel of Record

PRYOR, CASHMAN, SHERMAN & FLYNN

JAMIE M. BRICKELL

On the Brief

Counsel for Respondent

410 Park Avenue

New York, New York 10022

(212) 421-4100